APPENDIX

Constitutional and Statutory Provisions Involved

1. Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945, Ga. Code Ann. §2—6801:

Establishment and maintenance; board of education; election, term, etc.—Authority is granted to counties to establish and maintain public schools within their limits. Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education. The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Said members shall be elected for the term of five years except that the first election of Board members under this Constitution shall be for such terms that will provide for the expiration of the term of one member of the County Board of Education each year. In case of a vacancy on said Board by death, resignation of a member, or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the next Grand Jury convenes at which time the said Grand Jury shall appoint the successor member of the Board for the unexpired term. The members of the County Board of Education of such county shall be selected from that portion of the county not embraced within the territory of an independent school district.

The General Assembly shall have authority to make provision for local trustees of each school in a county system

and confer authority upon them to make recommendations as to budgets and employment of teachers and other authorized employees.

2. Article VIII, Section V, paragraph II, of the Constitution of the State of Georgia of 1945, Ga. Code Ann. §2—6802:

Boards of education; change by referendum.—Notwithstanding provisions contained in Article VIII, Section V, paragraph I [§2-6801] of this Constitution, or in any local constitutional amendment applicable to any county school district, the number of members of a county board of education, their term of office, residence requirements, compensation, manner of election or appointment, and the method for filling vacancies occurring on said boards, may hereafter be changed by local or special law conditioned upon approval by a majority of the qualified voters of the county school district voting in a referendum thereon. Members of county boards of education shall have such powers and duties and such further qualifications as may be provided by law.

3. Ga. Code Ann. §23—802:

Meetings of certain governing bodies to be public.—All meetings of the governing bodies of all municipalities and counties in this State, boards of public instruction, and all other boards, bureaus, Authorities or commissions in the State of Georgia, excepting grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings: Provided, however, that before or after said public meetings said governing bodies, boards, bureaus, Authorities or commissions may hold executive sessions

privately but the ayes and nays of any balloting shall be recorded at the conclusion of said executive sessions. (Acts 1965, p. 118.)

4. Ga. Code Ann. §32—901:

School districts.—Each and every county shall compose one school district, and shall be confided to the control and management of a county board of education. (Acts 1919, p. 320.)

5. Ga. Code Ann. §32—902:

Membership in County boards.—The grand jury of each county (except those counties which are under a local system) shall, from time to time, select from the citizens of their respective counties five freeholders, who shall constitute the county board of education. Said members shall be elected for the term of four years, and shall hold their offices until their successors are elected and qualified: Provided, however, that no publisher of schoolbooks, nor any agent for such publisher, nor any person who shall be pecuniarily interested in the sale of schoolbooks, shall be eligible for election as members of any board of education or as county superintendent of schools: Provided, further, that whenever there is in a portion of any county a local school system having a board of education of its own, and receiving its pro rata of the public school fund directly from the State Superintendent of Schools, and having no dealings whatever with the county board of education, then the members of the county board of education of such county shall be selected from that portion of the county not embraced within the territory covered by such local system. (Acts 1919, p. 320.)

6. Ga. Code Ann. §32—902.1:

Selection of board members by grand jury.—The members of the county boards of education in those counties in which the grand jury selects such members pursuant to Article VIII, Section V, Paragraph I of the Constitution of Georgia of 1945, as amended (Sec. 2-6801), shall be selected by the last grand jury immediately preceding the expiration of the term of the member that the member to be selected will replace. (Acts 1953, Nov. Sess., p. 334.)

7. Ga. Code Ann. §32—903:

Qualifications of members.—The grand jury in selecting the members of the county board of education shall not select one of their own number then in session, nor shall they select any two of those selected from the same militia district or locality, nor shall they select any person who resides within the limits of a local school system operated independent of the county board of education, but shall apportion members of the board as far as practicable over the county; they shall elect men of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system. Whenever a member of the board of education moves his residence into a militia district where another member of the board resides, or into a district or municipality that has an independent local school system, the member changing his residence shall immediately cease to be on the board and the vacancy shall be filled as required by law. Notwithstanding the foregoing provisions to the contrary, a county may provide by local law that two or more members of the board of education may be selected from the same militia district. (Acts 1919, pp. 288, 321; 1965, p. 124.)

8. Ga. Code Ann. §32—905:

Certificate of election; removal; vacancies.—Whenever members of a county board are elected or appointed, it shall be the duty of the clerk of the superior court to forward to the State Superintendent of Schools a certified statement of the facts, under the seal of the court, as evidence upon which to issue commissions. This statement must give the names of the members of the board chosen and state whom they succeed, whether the offices were vacated by resignation, death or otherwise. The evidence of the election of a county superintendent of schools shall be the certified statement of the secretary of the meeting of the board at which the election was held. Any member of a county board of education shall be removable by the judge of the superior court of the county, on the address of two-thirds of the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office, after opportunity to answer charges; the judges of the superior courts shall have the power to fill vacancies, by appointment, in the county board of education for the counties composing their respective judicial circuits, until the next session of the grand juries in and for said counties, when said vacancies shall be filled by said grand juries. (Acts 1919, p. 322.)

9. Ga. Code Ann. §32—908:

Sessions.—It shall be the duty of the county board of education to hold a regular session between the 1st and 15th of each month at the county seat for the transaction of business pertaining to the public schools, with power to adjourn from time to time, and in absence of the president or secretary, they may appoint one of their own number

to serve temporarily. The county board of education shall annually determine the date of the meeting of said board and shall publish same in the official county organ for two consecutive weeks following the setting of said date: Provided further that said date shall not be changed oftener than once in 12 months. (Acts 1919, p. 323; 1955, pp. 625, 626.)

10. Ga. Code Ann. §32—909:

School property and facilities.—The county boards of education shall have the power to purchase, lease, or rent school sites; build, repair or rent school houses, purchase maps, globes, and school furniture, and make all arrangements necessary to the efficient operation of the schools. The said boards are invested with the title, care and custody of all schoolhouses or other property, with power to control the same in such manner as they think will best serve the interests of the common schools; and when, in the opinion of the board, any schoolhouse site has become unnecessary or inconvenient, they may sell the same in the name of the county board of education, and said county boards of education may convey any schoolhouse site or building, which has become unnecessary or inconvenient for county school purposes and which is located in a municipality, to the municipality wherein said site or building is located to be used by said municipality for educational or recreational purposes in consideration for the municipality's promise and agreement to maintain and keep said property in repair and insured against loss by fire and windstorm; such conveyance to be executed by the president or secretary of the board, according to the order of the board. They shall have the power to receive any gift, grant, donation or devise made for the use of the common

schools within the respective counties, and all conveyances of real estate which may be made to said board shall vest the property in said board of education and their successors in office. In respect to the building of schoolhouses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system. The construction of all public school buildings must be approved by the superintendent and board of education and must be according to the plans furnished by the county school authorities and the State Board of Education. (Acts 1919, p. 323; 1937, pp. 882, 892; 1946, pp. 206, 207; 1961, pp. 35, 38; 1962, pp. 654, 655.)

11. Ga. Code Ann. §32—1101:

Each county to compose one school district; management by county board of education.—Pursuant to the amendment to the Constitution adopted in 1945, each county of this State, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a county board of education. (Acts 1919, p. 333; 1946, pp. 206, 209.)

12. Ga. Code Ann. §32—1118:

Other provisions made applicable. County Board to recommend school tax rate to fiscal authorities.—All of the other provisions of Chapter 92-27, so far as they can be applied are applicable to the assessment and collection of taxes of all such companies and corporations which are required by law to make their returns to the State Revenue Commissioner by and for school districts upon the property and franchises of such companies located in such school districts and upon the rolling stock, franchises and other

personal property distributed under the provisions of this Chapter. The county board of education shall annually recommend to the fiscal authorities of the county the rate of levy to be made for taxes for the support and maintenance of education in the county (exclusive of property located in independent school districts), and likewise notify the State Revenue Commissioner of the rate of the levy to be made on such property in said county for the support and maintenance of education. (Acts 1919, p. 343; 1946, pp. 206, 212.)

13. Ga. Code Ann. §32—1127:

Power to levy and collect taxes.—Power is hereby delegated to, and conferred upon, the several counties to levy and collect taxes for educational purposes in such amounts as the county authorities shall determine, the same to be appropriated to the use of the county board of education, and the educational work directed by them. (Acts 1922, pp. 81, 82.)

14. Ga. Code Ann. §59—101:

Jury commissioners; appointment; number; qualifications; terms; removal.—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Pro-

vided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners. (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

15. Ga. Code Ann. §59—106:

Revision of jury lists. Selection of grand and traverse jurors.—At least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon.

After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except

as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

16. Ga. Code Ann. §59—202:

Number of grand jurors.—A grand jury shall consist of not less than 16 nor more than 23 persons. (Cobb, 547. Acts 1869, p. 140; 1967, pp. 590, 591.)

17. Ga. Code Ann. §59—203:

Manner of drawing.—The judges of the superior courts, at the close of each term, in open court, shall unlock the box, and break the seal, and cause to be drawn from compartment number "one" not less than 18 nor more than 36 names to serve as grand jurors at the next term of the court; all of which names shall be deposited in compartment number "two"; and when all the names shall have been drawn out of the compartment number "one," then the drawing shall commence from compartment number "two," and the tickets be returned to number "one," and so on alternately; and no name so deposited in the box shall, on any pretense whatever, be thrown out of it, or destroyed, except when it shall be satisfactorily shown to the judge that the juror is dead, removed out of the county, or otherwise disqualified by law. (Acts 1869, p. 140; 1874, p. 20; 1966, p. 470.)

18. Ga. Code Ann. §59—318:

Selection of persons for offices by grand jury; notice.—Whenever it is provided by law that the grand jury of any

county shall elect, select or appoint any person to any office, notice thereof shall be given in the manner hereinafter provided. (Acts 1958, p. 686; 1959, p. 424.)

19. Ga. Code Ann. §59—319:

Same; publication.—It shall be the duty of the clerk of the superior court to publish in the official organ of the county a notice that certain officers are to be elected, selected or appointed by the grand jury of said county. Such publication shall be made once a week for two weeks during a period not sooner than 60 days prior to such election, selection or appointment. The cost of such advertisement shall be paid from the funds of the county, and it shall be the duty of the governing authority of the county to promptly pay said cost. (Acts 1958, pp. 686, 687; 1959, pp. 424, 425.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 23

CALVIN TURNER, et al.,
Appellants,

v.

W. W. FOUCHE, et al.,
Appellees.

BRIEF FOR THOSE WHO ARE REMAINING APPELLEES (OTHER THAN STATE OF GEORGIA).

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Cases Cited.

Statutes Cited.

Textbook Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 842.

CALVIN TURNER, et al.,
Appellants,

v.

W. W. FOUCHE, et al.,
Appellees.

BRIEF FOR THOSE WHO ARE REMAINING APPELLEES (OTHER THAN STATE OF GEORGIA).

INTRODUCTORY STATEMENT.

This case continues to bear the title **Calvin Turner, et al., Appellants v. W. W. Fouche, et al., Appellees,** although the Appendix very clearly shows that on January 30, 1968, "on motion of the defendants, the defendants W. W. Fouche, Rastum Durham and Elmo Bacon, individually and in their capacities as Grand Jurors of Taliaferro County, Georgia, are hereby struck as defendants" (Appendix, p. 71).

In our motion to dismiss or affirm filed herein on or about January 30, 1969, we made a special motion with respect to Fouche, Durham and Bacon (page 16 thereof). When on February 24, 1969, the Court noted probable jurisdiction, there was apparently no ruling as to this special motion. We renew it.

Because of 28 U. S. C., § 1253, this case is here on direct appeal from a judgment of a Three-Judge District Court convened pursuant to 28 U. S. C., § 2281.

In the Court below we contended that the case as alleged in the complaint was not one for a Three-Judge Court. We moved to dissolve it (Appendix, page 19). This motion was denied.

When the direct appeal and subsequent jurisdictional statement were filed, we moved to dismiss or affirm.

We then contended that the case was not one for a Three-Judge Court. We filed a brief in support of that contention. Nevertheless, probable jurisdiction was noted (February 25, 1969. Appendix, page 408).

We continue to contend that the complaint did not allege a case within the purview of Title 28—§ 2281, and hence not one of which this Court has jurisdiction by direct appeal. Even now, the Court may so hold and dismiss the appeal.

Supreme Court Practice (Robert L. Stern; Eugene Gressman) Third Edition, pages 51-2; **United States v. Griffin**, 303 U. S. 226.

But, if the Court decides that it has jurisdiction, what are the questions of which it has jurisdiction?

The only statute which could have conferred jurisdiction on the Court below is Title 28, U. S. C., § 2281.

Under that statute, and the cases construing it, the need for a Three-Judge Court and the scope of its jurisdiction,

and the consequent jurisdiction of this Court on direct appeal are very limited ones.

". . . the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved." **Ex Parte Collins**, 277 U. S. 565, 568 (48 S. Ct. 585, 586).

Later, Mr. Justice Frankfurter, writing for a unanimous court in **Phillips, Governor v. United States, et al.**, 312 U. S. 246, at page 249, cited **Ex Parte Collins** as authority for the statement "The legislation was designed to secure the public interest in 'a limited class of cases of special importance'."

Immediately following that citation, he wrote:

"It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. **Moore v. Fidelity & Deposit Co.**, 272 U. S. 317, 321. The history of § 266 (see **Pogue, State Determination of State**

Law, 41 Harv. L. Rev. 623, and **Hutcheson, a Case for Three Judges**, 47 Harv. L. Rev. 795), the narrowness of its original scope, the piece-meal explicit amendments which were made to it (see Act of March 4, 1913, 37 Stat. 1013, and Act of February 13, 1925, 43 Stat. 936, amending § 238 of the Judicial Code), the close construction given the section in obedience to Congressional policy (see, for instance, **Moore v. Fidelity & Deposit Co.**, *supra*; **Smith v. Wilson**, 273 U. S. 388; **Ex parte Collins**, *supra*; **Oklahoma Gas Co. v. Packing Co.**, 292 U. S. 386; **Ex parte Williams**, 277 U. S. 267; **Ex parte Public National Bank**, 278 U. S. 101; **Rorick v. Board of Comm'rs.**, 307 U. S. 208; **Ex parte Bransford**, 310 U. S. 354), combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.

"To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court —requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases."

Ex parte Collins, *supra*, has recently been cited, applied and followed in **Moody v. Flowers**, 387 U. S. 97, 101-2.

See also, "Motion of Appellees (other than State of Georgia) to dismiss or affirm" (filed herein), pages 5-8.

Counsel for appellants have from time to time as this litigation progressed varyingly stated the questions involved.

In the complaint, it is alleged that each of certain statutes "is unconstitutional under the Equal Protection and Due Process of Law Clauses of the Fourteenth Amendment of the Constitution of the United States, and the Thirteenth Amendment thereto **on its face and as applied,** by reason of the systematic and long continued exclusion of Negroes, the uncertainty, vagueness, and ambiguousness of the standards set forth therein, and by reason of the total exclusion of non-freeholders as members of the Board of Education of Taliaferro County" (Emphasis added, Appendix, p. 12) (See also Appendix, pages 9, 12-13, 14).

In the jurisdictional statement filed by counsel for the appellants, the "Questions Presented" are stated at page 3 (The last one was afterwards corrected).

In Appellants' brief filed by the same counsel, the "Questions Presented" are stated at page 4.

The Three-Judge Court in its opinion said:

"The court finds and concludes that the grand jury list, as revised, is not unconstitutional or illegal. The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any

particular segment of the community, based on race or otherwise.

"There is thus no merit in the three-judge District Court questions presented. There remain, however, two single judge questions . . ." (Appendix, page 403).

As we construe Title 28—§ 2281 and the many cases construing it, the only possible questions which the Supreme Court would have jurisdiction to adjudicate on this direct appeal are:

1. Is Article VIII, Section V, Paragraph 1 of the Constitution of Georgia (Code § 2-6801) (Appendix 1a-2a) unconstitutional because therein Georgia restricts membership on County Boards of Education to "freeholders"?

2. Is § 59-101 of the Georgia Code of 1933 (Annotated) (and related dependent statutes) (Appendix 8a) of the Georgia Code unconstitutional because it requires the Board of Jury Commissioners appointed by the Judge of the Superior Court of the Circuit to be "discreet persons"?

3. Is § 59-106 (and related dependent statutes) of the Georgia Code unconstitutional on its face because the jury commissioners are restricted in their making up of jury lists to the choosing of "intelligent and upright citizens"?

BRIEF AND ARGUMENT.

As a preliminary to a discussion of the law questions stated, we note the opening words of the argument of counsel for appellants in their brief (page 25). They say:

"In **Whitus v. Georgia**, 385 U. S. 545, 552 (1967), this Court condemned Georgia statutes which injected race into the selection of jurymen because they provided an 'opportunity to discriminate'."

What this Court actually wrote in **Whitus v. Georgia**, 385 U. S. 545, at page 552, was this:

"Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion. Although the system of selection used here had been specifically condemned by the Court of Appeals, the State offered no testimony as to why it was continued on retrial. The State offered no explanation for the disparity between the percentage of Negroes on the tax digest and those on the venires, although the digest must have included the names of large numbers of 'upright and intelligent' Negroes as the statutory qualification required. In any event the State failed to offer any testimony indicating that the 27.1% of Negroes on the tax digest were not fully qualified. The State, therefore, failed to meet the burden of rebutting the petitioners' prima facie case."

We know of no standard of conduct which could prevent **attempted** discrimination with respect to the subject matter. When an attempt to discriminate invidiously occurs, those against whom the attempt is made have

their remedy and redress. But, that does not mean that the statute is unconstitutional.

What was condemned in the Whitus case was not the Georgia Statute, but "the use by the State of a system of jury selection which had been previously condemned, . . ." (385 U. S. 545-6).

Then, in the brief follows this language:

". . . see also **Sims v. Georgia,** 389 U. S. 404 (1967); **Cobb v. Georgia,** 389 U. S. 12 (1967); **Jones v. Georgia,** 389 U. S. 24 (1967); **Anderson v. Georgia,** 390 U. S. 206 (1968); **Sullivan v. Georgia,** 390 U. S. 410 (1968); **Bostick v. South Carolina,** 386 U. S. 479 (1967)."

Instead of contenting ourselves with "seeing also", let us see what each of the cases cited holds.

Sims v. Georgia, 389 U. S. 404, holds:

"The **manner in which the juries** which indicated and convicted petitioner **were selected** was unconstitutional . . ." (**Sims v. Georgia,** 389 U. S. 404 (2)).

Cobb v. Georgia, 389 U. S. 12, is a three line per curiam opinion, reading:

"The motion for leave to proceed ***in forma pauperis*** and the petition for a writ of certiorari are granted. The judgment is reversed. **Whitus v. Georgia,** 385 U. S. 545."

Jones v. Georgia, 389 U. S. 24, is a case in which one of counsel for the appellees here was counsel for Jones.

Then Jones appealed his murder conviction on the ground, among others, that the evidence of systematic exclusion of Negroes from grand and petit juries established a prima facie case of discrimination under **Whitus v. Georgia,** *supra.* The Court held that this prima facie case had not been overcome, and reversed.

Anderson, et al. v. Georgia, 390 U. S. 206, is a three line per curiam opinion exactly like that in **Cobb,** *supra,* except the last sentence is "The judgments of the Supreme Court of Georgia **are** reversed."

Sullivan v. Georgia, 390 U. S. 410, is a similar three line per curiam decision rendered March 18, 1968 (It has recently reappeared in the Supreme Court of Georgia and will be discussed hereinafter).

Bostick v. South Carolina, 386 U. S. 479, is a two line per curiam opinion reading: "The judgment of the Supreme Court of South Carolina is reversed. **Whitus v. Georgia,** 385 U. S. 545 (1967)."

No one of the cases would seem to help very greatly in the solution of the constitutional questions presented to the Three-Judge Court.

I.

Is Article VIII, Section V, Paragraph I of the Constitution of Georgia (Code § 2-6801—Appendix 1a-2a) unconstitutional because therein Georgia restricts membership on County Boards of Education to "freeholders"?

In **Vought, Impleaded with Collins v. State of Wisconsin,** 217 U. S. 590 (1910), the plaintiff in error had been convicted and sentenced. He asserted that the law under which the jury was drawn was unconstitutional under the Fourteenth Amendment in that he was put to trial under an indictment found by persons selected by jury commissioners who were required by statute to be **freeholders.** The case was argued April 15, 1910. Three days later, April 18, 1910, a Court composed of Chief Justice Fuller, and Associate Justices John Marshall Harlan, Edward D. White, Joseph McKenna, Oliver Wendell Holmes, William R. Day, and Horace H. Lurton dismissed the case for want of jurisdiction as the Federal question attempted to be raised was without merit.

This prompt disposition of that case could have been foreseen by the fact that in 1880 it had been explained by the Court, when composed of justices familiar with the evils the Fourteenth Amendment sought to remedy, as permitting a State to "confine the selection (of jurors) to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications." **Strauder v. State of West Virginia,** 100 U. S. 303, 310, quoted in **Brown v. Allen,** 344 U. S. 443, 471.

Thus a state may constitutionally require a jury commissioner to be a freeholder. *A fortiori,* a State may require a member of a County Board of Education to be a freeholder. The reasons are succinctly discussed by the Supreme Court of Georgia in **Thornton v. McElroy,** 193 Ga. 859.

There, an act of the General Assembly creating the Board of Commissioners of Roads and Revenues of Clayton County provided that the Commissioners should be freeholders and qualified voters of the County. McElroy was not a freeholder of Clayton County though he did own land in another county. He was held to be disqualified.

The Court said:

"This is also the reasonable construction to be given the sentence, because a person's ownership of land in one county would seem to have little or no relationship to his qualification to hold office as a county commissioner in another county while his ownership of land in the county in which he is elected commissioner might be expected to have a direct bearing on his conduct in the performance of the duties of that office. The board of commissioners has charge of the fiscal affairs of the county, and the amount of taxes levied may depend to a large extent upon the manner in which the affairs of the county are conducted by that board. A commissioner

who owns real estate in the county must bear its proportionate part of the cost of government, might reasonably be expected to be more prudent in the expenditure of county money than one who does not own property in the county" (**Thornton v. McElroy**, 193 Ga. 859, at pages 860-1).

Appellants say in their brief (page 52):

"The purpose of the provision is not expressed, but in the nineteenth century, when it was enacted, it was thought by many that only owners of real property were sufficiently concerned about government to exercise the duties of office."

This provision is in the Georgia Constitution of **1945**, so it is by no means archaic. While those who prepared and adopted the Constitution may not have expressed the purpose of the Constitutional provision, and while the General Assembly in adopting subsequent statutes may not have expressed the purpose, it is clear that there was a purpose. These boards "are invested with the title, care and custody of all school houses and other property with power to control the same in such manner as they think will best serve the interests of the common schools; and when in the opinion of the board, any school house site has become unnecessary or inconvenient, they may sell the same in the name of the county board of education; . . . (Ga. Code Ann., § 32-909—See Appendix to Appellants' brief, page 6 (a)).

"In respect to the building of school houses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system" (Ibid).

We will not labor the question by detailing other duties of such Boards.

A person having such fiscal responsibilities should have the qualification of having acquired some property himself. At least, the people of Georgia and their General Assembly thought so, and certainly that thought, while perhaps old-fashioned in the views of some people, cannot be deemed arbitrary, capricious or invidious.

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . ." (**McGowan v. Maryland**, 366 U. S. 420, 425-6).

Among the cases cited by the Court, there are **Williamson v. Lee Optical**, 348 U. S. 483, 489 (in footnote 3, page 426), and **Lindsey v. Natural Carbonic Gas Co.**, 220 U. S. 61, which the Court has recently (37 L. W. 4339) cited to support the statement: "Under the traditional standard, equal protection is denied only if the classification is 'without any reasonable basis'."

II.

Is § 59-101 of Georgia Code Annotated and related statutes (appendix 8a) unconstitutional because it requires the Board of Commissioners appointed by the Judge of the Superior Court of the Circuit to be "discreet persons"?

The sentence of the statute here attacked is:

"There shall be a board of jury commissioners composed of six discreet persons, who are not practicing attorneys at law or county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the Superior Court."

The attack is that it is left to the respective Judges of the Superior Courts of Georgia to determine whether

people he selects as jury commissioners are "discreet persons".

Under the Constitution of the State of Georgia (Code § 2-3801) "There shall be a Judge of the Superior Courts for each judicial circuit". The Superior Courts of Georgia are the highest in rank of the nisi-prius courts. No person may be a Judge of the Superior Court under Georgia's constitution unless at the time of his election, he shall have attained the age of thirty years, and shall have been a citizen of the State three years, and have practiced law for seven years (Code § 2-4801). By statute, they are prohibited from practicing law (§ 24-2607). Their jurisdiction is stated in § 24-2615 of the Code as well as in the Constitution (Code § 2-3901).

Georgia, as perhaps do other States, leaves many decisions to the discretion of the Judges of its highest trial court. For example, the "granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case" (Georgia Code Annotated § 55-108). Considerable discretion is vested in such judicial officers in the administration of the criminal laws. It is to be assumed that they know the meaning of the word "discreet". If anything in the law may be presumed, certainly a person possessing those qualifications which a Superior Court Judge in Georgia must have will be presumed to know that "discreet" means "prudent; cautious; wary; careful about what one says or does". If he doesn't, he is presumed to have a dictionary handy.

"Discreetly" means with discernment, prudently, judiciously. **Parks v. Des Moines**, 191 N. W. 728.

In a recent case, **Southern Railway Company v. Shealey**, 382 Fed. (2d) 752, Georgia's blow-post law (Code § 94-506) was attacked as being unconstitutionally vague under the due process and equal protection standards applicable to criminal cases. The Court said:

"Finally the appellant urges that the requirement in the Statute to give 'long', 'short', 'loud', and 'distinct' blasts of the whistle is vague because there is no standard to show what length blast is 'long' or 'short', what intensity of a blast is 'loud', or what quality of a blast is 'distinct', and that it is therefore unconstitutional. We are concerned here with a rule of civil conduct, not with the due process and equal protection standards applicable to a criminal case. In this instance 'the standard . . . is the practical criterion of fair notice to those to whom the statute is directed.' **Southern Ry. Co. v. Brooks**, 1965, 112 Ga. App. 324, 145 S. E. (2d) 76, 79. We know that blow post laws are universally in effect throughout the country and it takes no semanticist to understand the usual, accepted and ordinary meaning of the statutory words."

Neither does it take a semanticist to understand the usual, accepted and ordinary meaning of the word "discreet".

Suppose the word "discreet" were not in the statute, would it be void because no standard was given to the Judge by which to determine whom he should appoint as jury commissioners? We think not. It would be presumed that the Judges of the Superior Courts, in the administration of justice, would appoint persons whose traits of character, intelligence, devotion to duty warranted their sharing in such administration. If a judge should willfully or erroneously appoint an unfit person, the citizens of the county would have their remedy.

III.

Is § 59-106 (and related statutes) of the Georgia Code unconstitutional on its face because the Jury Commissioners are restricted in their making up of jury lists to the choosing of intelligent and upright citizens?

At page 34 of their brief, counsel for the appellants write: "In other spheres of governmental activity this

Court has declared similar language permitting public officials to make subjective decisions unconstitutional." Then in footnote 22 appended to the quoted language is a list of cases commencing with **United States v. L. Cohen Grocery Co.**, 255 U. S. 81. That was a criminal case. The basis of the decision was that the Constitution requires "that persons accused of crime shall be adequately informed of the nature and cause of the accusation."

Cline, Dist. Atty. v. Frink Dairy Co., 274 U. S. 445 ruled that the Fourteenth Amendment requires that there be due process of law, and imposes on the states an obligation to frame criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required (Compare **Connally v. General Construction Co.**, 269 U. S. 385, 391).

Herndon v. Lowry, 301 U. S. 242 involved a habeas corpus proceeding following a conviction for an alleged crime.

Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, held that a New York statute authorizing the issuance of a license for the exhibition of films unless the film is "sacrilegious" has an unconstitutional abridgement of free speech and free press as applied to the banning of a certain motion picture.

Winters v. People of the State of New York, 303 U. S. 507, involved a criminal prosecution. At page 515, the Court pointed out: "The standards of certainty in statutes punishing for offenses is higher than in those depending upon civil sanction for enforcement." And even the stronger are the standards in statutes punishing for offenses higher than in those prescribing standards for those selected to perform certain governmental functions. For example, Title 5 U. S. C., § 293 provides "There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance

of his duties, called the Solicitor General, who shall be appointed by the President by and with the advice and consent of the Senate . . ."

The phrase "learned in the law" is very vague, and might provoke considerable difference of opinion in a given situation, but would hardly result in a decision holding the Statute unconstitutional.

As we read **Louisiana v. United States**, 380 U. S. 145 (Appellants' brief, pages 34-35), while the statute there under consideration was found invalid, one of the compelling reasons for the holding was that "Louisiana . . . provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed." **Louisiana v. United States**, 380 U. S. 145 at page 152, citing 225 F. Supp. at 384.

With respect to the Mississippi Anti-Picketing Law, the Supreme Court (Justices Douglas and Fortas dissenting) said:

"But the statute prohibits only 'picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . .' The terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess(ing) at (their) meaning.' Appellants focus on the word 'unreasonably.' It is a widely used and well understood word and clearly so when juxtaposed with 'obstruct' and 'interfere.' We conclude that the statute clearly and precisely delineates its reach in words of common understanding . . ." **Cameron v. Johnson**, 390 U. S. 611 at 616.

The standard of "uprightness and intelligence" could certainly not be adjudged uncertain, indefinite, or vague as used in the statutes under consideration. The adjectives "upright" and "intelligent" are words of "common understanding."

For a century at least that standard has appeared in the Georgia law. The Constitution of Georgia of 1868 declared "that the General Assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors." (**Moses v. State**, 60 Ga. 140, 141.) The Act of 1869 (Ga. Laws 1869, p. 139) provided in what manner those upright and intelligent persons should be selected as jurors.

Section 59-106 as it apppeared in the Code of 1933 used the phrase "upright and intelligent", as did the codes back to 1869, to-wit: 1910, P. C. § 819; 1895, P. C. § 818; 1882, § 3910 (d); 1873, § 3907.

Until May 8, 1969, there had been no Georgia case defining the phrase. We suppose that was so because the meaning of the words is so plain that in 100 years no one questioned their meaning.

On May 8, 1969, the Supreme Court of Georgia decided No. 25147—**Sullivan v. The State**. (See also 223 Ga. 643; reversed, 390 U. S. 410, mentioned *supra*.)

We quote from a typescript copy of the opinion in that case: "Enumeration of error 4 alleges that Code § 59-106, as amended (Ga. Laws, 1967, page 25; Ga. Laws, 1968, page 533) is unconstitutional in that it requires the jury commissioners to compile, maintain, and revise a jury list of intelligent and upright citizens to serve as jurors, and the 'most experienced, intelligent and upright citizens' to serve as grand jurors, thereby allowing the commissioners to apply purely subjective, vague, and ambiguous standards in jury selection, in violation of the due process and equal protection clauses of the United States Constitution and Art. I, Sec. I, Par. III, V and XXV of the Constitution of Georgia."

"The question is whether the terms 'intelligent and upright' and 'most experienced, intelligent and upright'

are vague and indefinite to the point that due process and equal protection of the law would be denied."

"The Supreme Court of the United States in **Brown v. Allen,** 344 U. S. 443 (73 S. C. 397, 97 L. E. 469), stated that: 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.' The Supreme Court there recognized that the cross section of the population must be suitable in character and intelligence for the duty. In other words, character and intelligence are tests of qualification for jury service."

"The Georgia statute, requiring that 'intelligent and upright' citizens be selected for jury service, is no more vague and indefinite than the criterion fixed by the Supreme Court. Honest, just, conscientious, scrupulous, and honorable, are synonyms for upright. Webster's International Dictionary, Third Edition, page 2518. The Court in using the words 'suitable in character' must necessarily have had reference to good character, honest, honorable, or just persons. The Court in using the words 'suitable . . . in intelligence for that civic duty' meant that they were sufficiently intelligent to serve as a juror."

"The terms are not vague and indefinite. It is common knowledge that an upright person is one who is honorable, honest, and will do the right as he sees it. An intelligent person is one possessed of ordinary information and reasoning faculty. No particular degree of intelligence is required by this statute. Idiots, morons, and insane persons are not intelligent and would not qualify."

"The terms 'upright' and 'intelligent' are neither vague nor indefinite, and a court or board would have no

difficulty in their application. This ground is without merit."

The Georgia Court might have added that in **Brown v. Allen,** at pages 471-2 (of 344 U. S.), the Court also said:

"Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, Bentham, Elements of the Art of Packing as applied to Special Juries, page 6, **it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions.**"

Georgia's plan of good faith efforts to secure competent juries consists of these steps:

1. A Superior Court Judge, chosen by the Voters of his Circuit, possessing qualifications prescribed by Georgia's Constitution appoints discreet persons as Jury Commissioners;

2. Those Jury Commissioners choose from the official registered voters' list a jury list of intelligent and upright citizens of the county to serve as jurors.

3. Those jury commissioners pursuant to Georgia Code Annotated, § 59-106 (as amended by the Acts of 1968), after selecting the citizens to serve as jurors, must select from that jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors.

CONCLUSION.

The appellants' brief concludes with a prayer that the judgment of the Court below be reversed insofar as it denies declaratory and injunctive relief.

It will be noted (Appendix—page 406) that the Court below in its final judgment permanently enjoined the jury

commissioners from systematically excluding Negroes from the grand jury system in Taliaferro County. The Court did this despite the fact that it had found and concluded "that the grand jury list, as revised, is not unconstitutional or illegal."

So, the only questions remaining subject to review are those which spring from a portion of paragraph II of the Final Judgment (Appendix, pages 406-7).

That portion is:

"Article VIII, Section V, Paragraph One of the Constitution of the State of Georgia of 1945, 2 Georgia Code Annotated, Section 6801, 59 Ga. Code Annotated, Sections 101 and 106; and 32 Georgia Code Annotated, Sections 902.1, 903 and 905, are not unconstitutional on their face or as applied . . ."

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Certificate.

I certify that a copy of the within and foregoing brief has been transmitted by United States Mail with proper postage affixed to Messrs. Jack Greenberg and Michael Meltsner, 10 Columbus Circle, New York, New York, and a copy to Messrs. Howard Moore, Jr. and Peter Rindskoff,

859½ Hunter Street, N. W., Atlanta, Georgia, Attorneys for Appellants, and a copy to Alfred L. Evans, Jr., Esquire, Assistant Attorney General of the State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334.

This 5th day of June, 1969.

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Of Counsel for Remaining Appellees
Other Than State of Georgia.